IV may be considered in connection with point I and the exercise of a reasonable discretion.

VI. The State decisions in this case are in accord with the applicable decisions of this Court.

POINT I

The Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that state, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

(a) By Statute, the New York Courts are given discretionary jurisdiction.

It is contended by petitioner that the ordinary jurisdiction of New York, as prescribed by local statutes, is adequate to the occasion. Now between 1876 and 1913 it was the law of New York that where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action did not arise within New York, the New York Courts did not have jurisdiction. *Robinson* v. *Oceanic Steam*

Navigation Co., 112 N. Y. 315, 321; *Hoes* v. *The N. Y. N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434; Code of Civil Procedure, Sec. 1780, prior to 1913 amendment.

From 1913 to date the action has been discretionary with the Courts. Section 1780 of the Code of Civil Procedure of New York, Laws of 1913, Chapter 60, read, in part, as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> 1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.
>
> 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
>
> 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> 4. Where a foreign corporation is doing business within this State."

Section 46, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from Section 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation.—An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

AUG 29 1
CHARLES ELMORE

Supreme Court of the United States

October Term, 1928

No. 312

CHARLES L. DOUGLAS,

Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1928

CHARLES L. DOUGLAS, *Petitioner,* vs. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.	No. 312

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this state. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term but wrote no opinion. 223 App. Div. 782.

The Court of Appeals, on May 29th, 1928, in 248 N. Y. Rep. 78, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

Jurisdiction of this Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this Court on July 26th, 1928.

In the lower Courts petitioner contended that the Supreme Court of New York was without power to refuse to exercise jurisdiction and to dismiss the complaint in an action under the Federal Employers' Liability Act brought against a railroad common carrier doing business in New York; that the policy of the State of New York in opening its courts as a matter of right to a resident, and as a matter of discretion only, to a non-resident, under like circumstances, is unconstitutional and violates Section 2 of Article 4 of the Federal Constitution. Petitioner contended that Section 47 of the General Corporation Law of New York was void in its entirety (R., 13-15).

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co.*, 246

N. Y. 244, which held that the Courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

Statement of the Case

The plaintiff brought this action to recover for injuries alleged to have been received on December 1st, 1927, while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of suit (R., 10). The summons and complaint were served upon the Assistant Treasurer of The New York, New Haven and Hartford Railroad Company, who also was the person designated as the one upon whom process might be served within the State of New York (R., 6, 7). The defendant was organized under and by virtue of the laws of the State of Connecticut and was authorized to do business in the State of New York, having received a certificate for that purpose from the Secretary of the State of New York as provided by the General Corporation Law of that State (R., 7).

In its motion to dismiss the complaint the defendant urged that it would be unnecessarily burdensome to try this case in New York and that plaintiff would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The defendant moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-residents, the jurisdiction of the Court was wholly discretionary; that the Court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that Section 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

Question Presented

Whether the Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who happens also to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action, and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

Argument

I. The New York Courts have the right to dismiss this action, have at least discretionary jurisdiction:

(a) By statute the New York Courts are given discretionary jurisdiction.

(b) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

(c) Congress cannot enlarge state jurisdiction.

II. The judgment sought to be reviewed does not violate Section 2, Article 4, of the Federal Constitution.

III. The New York Courts cannot entertain jurisdiction of this case.

IV. For the New York Courts to entertain jurisdiction would be a burden on interstate commerce, in violation of the commerce clause of the Federal Constitution.

V. The Court of Appeals and lower Courts have held that jurisdiction discretionary. In effect, they have sustained points I and II and denied points III and IV. Petitioner contends that the discretionary statute is unconstitutional, and that the New York Courts must entertain this case. Respondent contends that the discretionary statute is unconstitutional and that the New York Courts cannot entertain this case. For the purpose of this proceeding, it is not necessary to go beyond the first step in order to deny the petition, that is, to hold that New York has something to say about the matter. Of course, points III and

Section 47, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from Section 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation by another foreign corporation or non-resident:—An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> 1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State at the time of the making thereof.
>
> 2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
>
> 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
>
> 4. Where a foreign corporation is doing business within this State.
>
> Within the meaning of this section, a foreign corporation shall not include a corporation located in this State and created by or under the laws of the United States."

These statutory provisions dating from 1913 have been treated in *Waisikoski* v. *Phila. & Reading Coal & Iron Co.*, 228 N. Y. 581; *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, 235 N. Y. 152; *Murnan* v. *Wabash Railway Co.*, *supra*.

In *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*, the Court said at page 160:

> " • • • by a long line of authorities, the Courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state where both plaintiff and defendant were non-residents."

The history of New York in this respect has been altogether different from the history of Connecticut and the decision in *Second Employers' Liability Cases*, 223 U. S. 1, referred to by petitioner, has therefore no application. It is true that the jurisdiction of an action arising under the Federal Employers' Liability Act may not be declined by the state Courts, whose ordinary jurisdiction is adequate to the occasion, on the theory that such a statute is not in harmony with the state policy. That was what the Supreme Court of Errors of Connecticut attempted to do.

Petitioner, on page 15 of his brief, also refers to the case of *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200, in this same connection, but in that case also the ordinary jurisdiction of the state Courts, as prescribed by local laws, was appropriate to the occasion.

(b) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

Section 6 of the Federal Employers' Liability Act (Act of Congress, April 22, 1908, C. 149, 35 Stat. 65) reads, in part, as follows:

> "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States • • •."

Congress, by the above statute, has not attempted to enlarge or regulate the jurisdiction of the state Courts. *Second Employers' Liability Cases, supra; Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142; *St. Louis & Iron Mt. Ry.* v. *Taylor*, 210 U. S. 281; *Walton* v. *Pryor, et al.*, 276 Ill. 563, in which writ of error was dismissed, in 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, which case was dismissed by this Court on stipulation, in 266 U. S. 639.

(c) Congress cannot enlarge state jurisdiction. New York may determine the limits of the jurisdiction of its Courts subject only to the Federal Constitution. *St. Louis & Iron Mt. Ry.* v. *Taylor, supra*, at page 285.

POINT II

The order and judgment do not violate Section Two of Article Four of the Constitution of the United States.

In the first place, New York, by statute and decision, distinguishes between "residents" and "citizens." The same distinction, which is not merely verbal, has been made by this Court and the Courts of other states. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373; *La Tourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60; *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553; *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U. S. 312; *Robinson* v. *Oceanic Steam Navigation Co., supra; Central R. R. Co.* v. *Georgia, etc., Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co., supra.*

Under Subdivision 4 of Section 47 of the General Cor-

poration Law of New York, *supra*, an action may be brought against a foreign corporation by a non-resident where a foreign corporation is doing business within this State. It has been declared that it is discretionary, under this provision, whether the Courts will entertain such action. We would have exactly the same result—discretionary jurisdiction—in the case of a citizen of New York who might be residing in Connecticut, who sues a foreign corporation doing business within this State, on a transitory cause of action arising outside of the State. The discrimination is not between citizens and non-citizens, but between residents and non-residents. In the case of a Connecticut citizen residing in New York, the Courts of New York would not have discretionary jurisdiction, but would have to entertain the action. The result—compulsory jurisdiction—would be the same as in the case of the New York citizen, residing in New York. In neither case is citizenship the test, or of any importance whatsoever.

Aside from this distinction, a discrimination is not unconstitutional, even as between citizens of different states if there is a "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, at page 79. We see this in cases involving statutes of limitation and taxation. *Canadian Northern R. Co.* v. *Eggen*, *supra*; *La Tourette* v. *McMaster*, *supra*.

The Courts may consider the interests of the people of the State in declining jurisdiction. *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, *supra*; *Hoes* v. *The N. Y. N. H. & H. R. R. Co.*, *supra*. The Courts may consider the interests of the parties. In *Davis* v. *Farmers' Co-operative Equity Co.*, *supra*, this Court took into consideration the heavy expense to carriers.

Instead of answering the complaint respondent made this motion at the very beginning of the case (R., 5). Both plaintiff and defendant were and are to be found in Connecticut (R., 7-9). The accident occurred in Connecticut (R., 6, 7, 9). The parties can litigate at home without the expense of calling witnesses from Connecticut to New York. The record shows no fact objection to trial in Connecticut, other than the allegation that the respondent is not without powerful influence in Connecticut and that the verdicts in that State are small and inadequate in cases for personal injuries against this respondent. These are bare assertions appearing in affidavits in opposition to respondent's motion (R., 13, 16).

In the case of *Loftus* v. *Pennsylvania R. Co.*, *supra*, Loftus, an employee of the Pennsylvania Railroad Company, was injured in Pennsylvania. He was a resident and citizen of that State and the Railroad was a corporation organized under the laws of Pennsylvania, but operated also in Ohio. A suit was brought in Ohio and the Railroad Company moved to quash the service of the summons. The statute excluded from the jurisdiction of the State Courts of Ohio all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occurring without the State of Ohio, unless the claimant was a resident of that State. The action was brought under the Federal Employers' Liability Act. It was held that the Federal law-making powers could not confer compulsory jurisdiction upon the trial Courts of Ohio. The Federal statute created the right and the states provided the remedy by establishing courts and declaring their jurisdiction.

It was contended that the statute of Ohio violated Section 2 of Article 4 of the Federal Constitution. But the Court said that the dominant purpose of this constitutional provision was to prevent arbitrary and unreasonable discrimination in each state in favor of its own citizens and against the citizens of other states (p. 363). The Court pointed out that the statute was based upon residence without regard to citizenship. It held that residence and citizenship were not synonymous.

Section 2 of Article 4 of the Federal Constitution looks to citizenship and not to residence. There has been a reasonable regulation of the internal affairs of New York State by way of discretionary jurisdiction.

POINT III

The New York Courts cannot entertain jurisdiction of this case

To do business within the State of New York, it was necessary for The New York, New Haven and Hartford Railroad Company, a foreign corporation, to procure a certificate, and before obtaining the certificate it had to designate a person upon whom process against the corporation might be served within the State.

Section 110, Subdivision 1, of the Stock Corporation Law, being Chapter 28, Laws of 1909, as amended by Chapter 594, Laws of 1917, reads, in part, as follows:

> "No foreign stock corporation other than a money corporation, shall do business in this state without having first procured from the secretary of

> state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation created under the laws of this state for such or similar business, • • •."

Chapter 787, of the Laws of 1923, being Section 111, of the Stock Corporation Law of New York, provides for the designation of a person upon whom process may be served. It would appear that the New York statute "was not intended to give the state Courts jurisdiction over foreign corporations by service on agents appointed thereunder, in transitory actions arising in another state." *Missouri Pac. R. Co.* v. *Clarendon Co.*, 257 U. S. 533. In transitory actions the tendency should be to restrict to the business done in New York particularly when both parties are non-residents. The statute of New York relating to discretionary suits should be interpreted in the light of the statute relating to designated agent and doing business in New York.

POINT IV

For the Courts of New York to entertain jurisdiction of this action would be an undue burden on interstate commerce.

We have already quoted Section 47, Subdivision 4, of the General Corporation Law of New York, whereby an action against a foreign corporation may be brought by a non-resident, where the foreign corporation is doing business within New York.

It has been held not to be an unreasonable burden upon interstate commerce to require a designated agent to accept service for causes of action arising within the State. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. But we submit that we do not reach the same result where the cause of action arises outside. *Old Wayne Life Association* v. *McDonough*, 204 U. S. 22; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Davis* v. *Farmers' Co-operative Equity Co., supra; Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977, District Court, Fourth Division.

The Federal Employers' Liability Act makes the jurisdiction of the Courts of the United States, in cases under the Act, concurrent with that of the Courts of the several states. Congress has expressly imposed a burden on interstate commerce where suits are brought in the Federal Courts, but has imposed no such burden where suits are brought in the state Courts.

POINT V

If the Courts of the State of New York have discretionary jurisdiction and if there has been no abuse of that discretion in refusing to entertain this case, then this petition for writ of certiorari should be denied.

POINT VI

The state decisions in this case are in accord with the applicable decisions of this Court.

CONCLUSION

We respectfully submit that the present petition should be denied.

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